No. 83-1564

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Appellant,

v.

UNION CARBIDE AGRICULTURAL
PRODUCTS COMPANY, INC., *et al.*,
Appellees.

On Appeal From The United States District Court For The Southern District of New York

SUPPLEMENTAL BRIEF OF APPELLEES

KENNETH W. WEINSTEIN
(Counsel of Record)
LAWRENCE S. EBNER
DAVID I. BOOKSPAN
MCKENNA, CONNER & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500

Attorneys for Appellees Union Carbide Agricultural Products Company, Inc., et al.

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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This supplemental brief is filed to demonstrate that under the Court's decision in *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), this case is ripe.

1. In *Ruckelshaus* v. *Monsanto*, the Court held that Monsanto's Fifth Amendment challenge to the constitutionality of FIFRA's arbitration and compensation scheme was not ripe. Slip op. at 31. The lack of ripeness stemmed from the availability of a Tucker Act remedy to redress the taking of Monsanto's property.

The Court found that for any taking that occurred, Monsanto had a remedy under the Tucker Act. Because the Tucker Act was available to supply just

compensation—and Monsanto thus did not have to depend on FIFRA to obtain just compensation—it was not necessary for the Court to decide whether FIFRA's arbitration and compensation scheme satisfied the Fifth Amendment's just compensation requirements. *Id.* The Court concluded, "Because we hold that the Tucker Act is available as a remedy for any *uncompensated taking* Monsanto may suffer as a result of the operation of the challenged provisions of FIFRA, we conclude that Monsanto's challenges to the constitutionality of the arbitration and compensation scheme are not ripe for our resolution." Slip op. at 30-31 (emphasis added).

The instant case is not brought under the Taking Clause. Consequently, *the Tucker Act has no bearing on the issues in this appeal:* (1) whether FIFRA's delegation of judicial and legislative powers to arbitrators violates the Constitution's separation of powers; and (2) whether the use of an owner's data should be enjoined where the arbitration and compensation scheme mandated by FIFRA is unconstitutional. For this reason, the ripeness ruling in *Monsanto* has no effect on this case.*

2. This case is ripe because appellees have been harmed—and more importantly *will* be harmed—by FIFRA's use-compensation system. *Appellees' principal complaint is with EPA's use of their data.* The government does not dispute that appellees' data have been used to grant me-too registrations to competitors. Nor does it dispute that EPA will continue to use their data for this

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*Furthermore, the availability of the Tucker Act cannot cure the Article I and III defects in the arbitration-compensation scheme because the category of data subject to FIFRA compensation adjudications is far broader than the narrow category of data to which the Tucker Act remedy applies under the *Monsanto* decision (data submitted betwen October 2, 1972 and September 30, 1978).

purpose, in the absence of the injunctive relief granted by the district court. Therefore, it is ripe for this Court to decide whether EPA's use of data was properly enjoined, where the compensation scheme imposed by FIFRA as a condition for data use is unconstitutional under Articles I and III.

3. Even under the ripeness criteria applied to Monsanto's Taking Clause challenge—criteria which we contend are not relevant here—this case is ripe because appellee Stauffer Chemical Company has endured an unconstitutional arbitration and is aggrieved by the result. Appellees established in the district court as part of their summary judgment motion (and the government did not dispute) that Stauffer's data were used by EPA under FIFRA to grant me-too registrations to PPG Industries. As a result of that use, an arbitration award was made to Stauffer for a fraction of the amount of compensation claimed. *In re Stauffer Chemical Co.* v. *PPG Industries*, No. 16 199 077 82 FIFRA (Am. Arb. Ass'n June 28, 1983). The arbitration thus left Stauffer aggrieved, but FIFRA expressly precluded judicial review of the merits of the award.

The district court, noting that appellees were not complaining of the result of any specific arbitration, held that FIFRA's arbitration and compensation scheme is unconstitutional, and consequently enjoined any use of

data conditioned on such compensation payments. Even under the criteria applied to Monsanto's taking claim (slip op. at 31), this holding is clearly ripe for review.

Respectfully submitted,

KENNETH W. WEINSTEIN
(Counsel of Record)

LAWRENCE S. EBNER
DAVID I. BOOKSPAN
MCKENNA, CONNER & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500

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